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Before the

Assembly Standing Committee on Consumer Affairs and Protection
Assembly Standing Committee on Corporations, Authorities and Commissions

Hearing to Examine the Need for Increased Consumer Protection for Wireless Telephone
Customers in New York State

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Chair of the Consumer Affairs and Protection Committee, Assemblymember Pheffer, Chair of the Corporations, Authorities, and Commissions Committee, Assemblymember Brodsky, and members of these committees, thank you for this opportunity to participate in these hearings to examine the need for increased consumer protection for wireless telephone customers in New York State. I am here on behalf of the Public Utility Law Project (PULP). For over 25 years, PULP has represented the interests of low and fixed income consumers in matters affecting affordability, universal service and consumer protection for telephone, gas and electric utility services.

In this testimony, I will describe briefly the stark contrast that is developing between the consumer protections that are available to consumers of wireline telephone services and those who obtain telephone service from wireless telephone service providers. Next, I will describe the voluntary code of conduct which some wireless telephone service providers have voluntarily adopted and will address the shortcomings of voluntary codes in general, and of this code for wireless telephone service providers in particular. Third and last, I will describe for the committee the Assembly legislation, A. 8539, which would address the glaring need for additional consumer protections for wireless telephone service customers.

Existing Consumer Protections

The framework for the existing consumer protections for telephone service providers actually began with the enactment in 1981 of the Home Energy Fair Practices Act (“HEFPA”), Article 2 of the Public Service Law. The enactment of HEFPA was the clearest statement to date of the importance of consumer protections for utility service customers and, in specific terms, what those protections should encompass. After the passage of HEFPA, there were several legislative proposals to enact similar statutory protections for telephone service customers. The need for this legislation, however, was mooted when the Commission undertook, by regulation, to implement for telephone service customers consumer protections analogous to those provided in HEFPA. These regulations were adopted in 1984 and are now Part 609 of the Commission’s rules. They are known colloquially as TEFPA.

Like HEFPA for gas and electric customers, the TEFPA rules provide relatively comprehensive and uniform protections to residential telephone consumers regarding application rights, suspensions, terminations, reconnections, deferred payment agreements, medical emergency rights and complaint procedures. In general, these rules and their administration by the Commission have produced meaningful protections and met consumer expectations for a fair playing field between consumers and their telephone service providers.

The TEFPA rules predate the widespread introduction of wireless telephone service. Before the mass market for wireless telephone service fully developed, however, the Public Service Law was amended in 1997 to “suspend” the application of the Public Service Law, including the consumer protection provisions applicable to telephone service providers, to providers of wireless telephone services. In the Governor’s approval message in support of this abrupt withdrawal of consumer protection authority, wireless telephone service is

characterized as a “non-basic service” with respect to which “very few complaints” were received by the Commission or the Consumer Protection Board.

Today, we know that there are millions of wireless telephone service customers in New York State and that, basic or not, many customers spend several hundred dollars a year for this service. In recent years, we also know that consumer complaints about wireless telephone service are commonly received by the New York State Consumer Protection Board and the State Attorney General. Whatever the circumstances providing a rationale for the abdication of jurisdiction in 1997, those circumstances have changed.

The 1997 legislation included an important proviso authorizing the Commission to end the suspension of its jurisdiction at any time upon a finding by the Commission that the continuation of the suspension was not in the public interest. The statute, therefore, includes within itself a recognition that important State policies, including historic policies defining and securing consumer protections, have a continuing value and, where the public interest requires, these policies will trump the “deregulatory” initiative embodied in the statutory suspension. In effect, while suspending Commission jurisdiction at that time, the 1997 legislation included all the tools the Commission would need to reassert Commission jurisdiction, including Commission jurisdiction to define and enforce consumer protection regulations, when necessary to protect the public interest.

Despite the explicit language authorizing the reassertion of Commission jurisdiction to apply consumer protection rules to wireless telephone service providers, the Commission has thus far made no attempt to do so.

The “Consumer Code for Wireless Service”

While the executive agencies in New York State have endorsed and actively maintained the status quo in New York which provides no consumer protections for wireless service customers, the wireless industry has not remained on the sidelines. Rather, the Cellular Telecommunications and Internet Association, or CTIA, which is the national trade association for the wireless industry, has vigorously promoted its “Consumer Code for Wireless Service”.

The CTIA Code was first announced in September 2003. After its announcement, many wireless service providers “signed up” or “adopted” this code. However, there are many ways in which the CTIA Code is inadequate for consumer protection purposes.

First, it should be noted that this “Consumer Code” is not a code at all. It is not a statute. It was not enacted by any legislature, nor approved by a governor or, on the federal level, by the President. It is not a law. Plainly, the CTIA and its members have named it a “Code” to suggest to the uninitiated public that statutory standards already exist to restrict the practices of wireless telephone service providers. In effect, under this strategy, state action, such as is being proposed in New York to create a real, statutory code could be discouraged if the industry can characterize its own “Code” as already in place.

Second, consumers now know that wireless telephone service may not deliver on the service promises made by its providers. When this occurs, the consumer expectation is that consumer protection measures created for this purpose will address these issues fairly, effectively and efficiently. Specifically, any analysis of proposed consumer protection measures would ask the following questions:

- q Does the proposal require the service provider to make a good faith estimate of charges for service as part of the offer for service?
- q Are the prices for service from competitive suppliers transparent for price comparison by the consumer?
- q Does the trial period for service include the receipt of at least one bill for service?
- q Does the proposal require disclosures on E-911 service?
- q Do plain language requirements apply to bills?
- q Does the code include fair notice and opportunity to cure before service termination?
- q Where appropriate, are the consumer protections comparable to those provided to customers of wireline telephone services?
- q Is the complaint resolution process prompt, uncomplicated and inexpensive?
- q Are complaints, if unresolved by the service provider, reviewable by a third party decision maker with authority to resolve the complaint?
- q Are protections provided while a consumer complaint is being reviewed?

To the extent that the response to any of these questions is “no”, a serious shortcoming in the proposed consumer protection program is identified, and the efficacy of the proposed measures would be doubtful. When these questions are used to assess the CTIA Code, the answer to each and every question is “no”. Against this scorecard, the CTIA Code fails completely to meet consumer expectations as to the scope and nature of the consumer protection program being provided.

Third, the enforcement mechanism behind the CTIA Code lacks all credibility. Under the CTIA Code, each service provider certifies that it is in compliance. Therefore, there is no unbiased evaluator of the service provider’s program. Indeed, there is no evaluator at all – other than the service provider itself. Moreover, this self-certification need be performed no more often than once a year, so a service provider may certify compliance, go out of compliance at any time thereafter, then simply amend its practices before the end of the year and re-self-certify compliance for the next year. This might be a clever strategy for

compliance if the penalty for non-compliance were meaningful. However, the “penalty” for failure to successfully self-certify (if that should ever occur) is only that the service provider can not display the “Seal of Wireless Quality/Consumer Information”. This is what this “Seal” looks like:



Under the CTIA program, participating service providers are permitted to display this “Seal” in their advertising and other promotional materials. If you look, however, at the almost ubiquitous wireless telephone service advertising in most newspapers, this “Seal” is not present. It is not being used. Therefore, it appears that the principal enforcement tool in the CTIA voluntary program is one which merely bars the non-complying service provider from using as part of its advertising something that they are not using now.

The Wireless Telephone Consumer Protection Act

In the current legislative session, PULP has joined with other consumer advocates to urge the adoption of comprehensive legislation to establish a program of consumer protections for wireless telephone service consumers. In the absence of State regulatory actions to provide these protections, we have concluded that the need for these protections will best be met through enactment of comprehensive legislation. Further, because the wireless and wireline markets are increasingly integrated, we believe the time has long since past when wireline service customers are protected by a meaningful set of consumer protections and wireless service customers will have no protections at all.

This legislation provides a comprehensive set of protections for wireless telephone service consumers. These would address the most significant problems encountered by these consumers when they subscribe to or maintain their wireless service, and level the field between the protections provided to wireline service customers and wireless service customers. Three elements of the bill, in particular can be highlighted.

Under existing practices, most new wireless telephone service customers have a “trial” period after they sign up for service during which the customer can discontinue service without incurring a penalty. These trial periods end, however, before the customer actually receives a bill for the service he or she is receiving. Thus, these shortened trial periods are ineffective in providing the customer with the opportunity to protect themselves when the cell telephone service turns out to be more expensive than it appears in the sales promotional materials. Also, because the trial period ends before the customer’s first bill is received, the availability of the trial period provides no discipline to limit exaggerated sales claims. No matter how uninformative the sales promotional materials are as to the actual cost of the service, the customer’s trial period will expire before the true cost of the service becomes known to the consumer. In the legislation supported by PULP, and in contrast to

industry practices today, the customer's trial period ends 15 days after the customer receives his or her first bill for service.

Second, many wireless telephone service customers acquire service as a further protection in the event an emergency occurs and wireline service is unavailable. For these customers, E-911 service is a particularly important part of the service provided by the wireless service provider. For another important segment of customers, wireless service is being taken as a substitute for wireline service. While these customers do not place a special reliance on E-911 capability, they often believe that the wireless service will have at least as good an E-911 service as the wireline service they may no longer be taking. Neither of these types of customers may understand that E-911 service may not be consistently available with wireless telephone service. The legislation supported by PULP would include with the other disclosures made at the time service is purchased an explicit requirement for the effective disclosure of the E-911 capability associated with the proposed service.

Third, in any effective program of consumer protections, the clear definition of proscribed provider behavior must be accompanied by effective penalty provisions and efficient, reliable and economical consumer complaint resolution mechanisms. On the one hand, effective penalty provisions remove the possibility that the service provider will forego compliant behavior because the cost of compliance is greater than the penalty for non-compliance. In the proposed legislation, the penalty mechanism provides for administrative penalties of up to \$1000 for each violation by a service provider of a protection created under the statute. In addition, and equally as important, the legislation provides an administrative mechanism, apart from the imposition of the administrative penalty, for the resolution of individual consumer complaints. Thus, under the bill each consumer victimized by a violation of the consumer protections provided in the bill may seek relief through an administrative process which is fair, which is likely to provide a prompt decision with respect to the complaint, and which is economically viable even for an individual consumer seeking a remedy for a single violation to him or her.

Conclusion

In conclusion, PULP appreciates the initiatives of these committees in scheduling and conducting this hearing on the need for increased consumer protection for wireless telephone customers in New York State. We hope that you will review closely the legislation on this subject that we are recommending and that action on this bill can be taken promptly.

Thank you for the opportunity to appear before these committees and to provide our views on these important issues.